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No. 06-1068

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal

BRIEF FOR THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This brief addresses the following question presented by the Petition:

Whether the California punitive damages statute deprives defendants of fair notice, and thus violates due process, when applied to permit the imposition of punitive damages without regard to objective indicators of reasonableness, such as industry custom, governmental safety standards, and the existence of a genuine debate in the engineering community.

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BRIEF AMICI CURIAE OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

The Alliance of Automobile Manufacturers, Inc. ("the Alliance") and the National Association of Manufacturers ("the NAM") respectfully submit this brief amici curiae in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICI CURIAE

The Alliance is a nonprofit trade association formed in 1999 and incorporated in Delaware. The Alliance has nine members: BMW Group; DaimlerChrysler Corporation; Ford Motor Company ("Ford"); General Motors Corporation; Mazda North American Operations; Mitsubishi Motors North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc.; and Volkswagen of America, Inc. The Alliance's members account for more than 80% of motor vehicle sales in the United States.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The Alliance and the NAM often file amicus briefs in cases – like this one – that are of great interest and conse-

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel contributed monetarily to the brief.

quence to the automobile industry and manufacturers more generally. They are filing this brief to address only the first question presented by the Petition, which concerns the fair notice required before a jury may impose any punitive damages against a defendant.

The Alliance and the NAM are concerned about the effects of skyrocketing punitive damages awards on product manufacturers. For example, accidents involving automobiles often result in serious injury or death, even when the automobile manufacturer has complied with all applicable safety statutes and regulations and the automobile includes the latest and best safety features. In manufacturing an automobile – or any product, for that matter – a manufacturer must necessarily make tradeoffs between product performance and safety, taking into account engineering limitations. Under many state products liability laws, juries are permitted to hold a manufacturer strictly liable based on *post hoc* findings that the manufacturer chose wrong in making those tradeoffs, *i.e.*, that, in the jury's view, the risks of the product outweigh its benefits. And, on top of compensatory liability, juries often award massive punitive damages when they believe the manufacturer chose wrong, even when the manufacturer's good-faith design choice was consistent with industry standards and federal regulations and therefore objectively reasonable. As a result, manufacturers simply have no way of knowing whether their reasonable design decisions may years later be subject to punishment.

The Alliance and the NAM believe that this Court's intervention is necessary to ensure that manufacturers are not punished in the absence of fair notice that their conduct was unlawful. The decision below allows punishment where reasonable people could disagree about what the law permits, and that result is inconsistent with due process.

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY TO ADDRESS THE FAIR NOTICE REQUIRED BY DUE PROCESS BEFORE PUNITIVE DAMAGES MAY BE IMPOSED

This Court should grant the petition to address the important issue of whether state laws permitting the imposition of punitive damages without regard to objective indicators of reasonable conduct provide the fair notice required by the Due Process Clause. As a matter of procedural due process, a person may not be subjected to any punishment – including punitive damages – unless he has been given notice sufficient to allow a "person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). If reasonable people could disagree about whether conduct violates a statute, then the statute may not be a basis for punishment, because any punishment would be wholly arbitrary. This principle is fundamental, and it was recently reaffirmed in *Philip Morris USA v. Williams*, where the Court repeatedly noted its "concern for adequate notice" in the punitive damages context. 127 S. Ct. 1057, 1064 (2007); *see also id.* at 1062, 1063.

The California Court of Appeal's application of the State's punitive damages statute was contrary to that importance notice principle. California law allows punitive damages to be awarded upon a showing of "malice," and the plaintiffs here argued that Ford acted with malice in choosing a particular design for the Ford Explorer. Ford noted that there were several objective factors relevant to whether punitive damages were proper, including its conformity with industry customs, compliance with stringent federal regulations, and the fact that the design resulted from a good-faith debate among engineers during the design process. Those factors showed that reasonable people can disagree about the appropriateness of the design choices Ford made, and thus

Ford could not have known that its conduct could be subject to punitive damages. Yet the Court of Appeal decided that those objective indicators were "irrelevant" to the question of whether punitive damages were permissible, Pet. App. 23a, and it approved a $55 million award of punitive damages without ensuring that Ford had fair notice and an opportunity to conform its conduct to the law. The decision below is contrary to this Court's precedents and to the decisions of several state and federal courts.

The fair notice issue raised in this case is important. Although this Court has addressed the notice required of the *severity* of a punitive damages penalty, it has not addressed the notice required before certain conduct can be subject to punishment as a threshold matter. The latter question arises with great frequency in products liability cases, especially those involving motor vehicles, where punitive damages verdicts continue to skyrocket. *See, e.g.*, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part).

Indeed, in products liability cases, juries routinely award punitive damages based not on a manufacturer's malicious intent to harm consumers but instead on their own second-guessing of good-faith design decisions made years or decades ago. Juries often use a manufacturer's balancing of the cost of design alternatives with risks to consumers as a basis for punitive damages, even though that balancing occurs in the development of *every* product and *any* product could arguably be made "more safe." Without use of objective factors to guide the jury's consideration of whether the manufacturer acted with the requisite reprehensibility, juries will be left with standardless discretion to award punitive damages in products liability cases. This Court should grant review and hold that punitive damages have no place where reasonable people could disagree about whether a defendant's conduct was unlawful.

A. The Due Process Clause Requires That A Defendant Be Afforded Fair Notice Before Being Subjected To Punitive Damages

1. It is a fundamental principle of due process that a person may not be punished for certain conduct without having received fair notice that engaging in that conduct may subject him to punishment. A punishment imposed without fair notice is inherently arbitrary, and due process "prohibits the imposition of . . . arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). "Indeed, the point of due process – of the law in general – is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (O'Connor, J., dissenting). Not only does fair notice ensure that a punishment is not arbitrary, but "it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

In terms of what constitutes "fair notice" that certain conduct may be subject to punishment, this Court has recognized that a statute authorizing punishment is so vague that it violates due process when it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. "Vague laws may trap the innocent by not providing fair warning." *Id.* A defendant may not be punished, then, based on a "statute which either forbids or requires the doing of an act in terms so

vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

The requirement of fair notice applies equally to both criminal and civil penalties. *See Gore*, 517 U.S. at 574 n.22. This Court has repeatedly invoked the principle to invalidate civil statutory penalties. *See, e.g., Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966); *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 241-43 (1932); *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 238-42 (1925); *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915).

Punitive damages are one type of civil penalty for which fair notice is particularly important. This Court has explained that there are both "procedural and substantive constitutional limitations" on punitive damages awards. *State Farm*, 538 U.S. at 416. As a procedural matter, "elementary notions of fairness enshrined in our constitutional jurisprudence dictate" that a defendant receive fair notice *both* "of the conduct that will subject him to punishment" *and* "the severity of the penalty that a State may impose." *Id.* (internal quotation marks omitted). While this Court has addressed the failure to provide fair notice of the severity of a punishment, the right to fair notice of the conduct that can give rise to punishment has an even longer pedigree. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 105-06 (4th Cir. 1991).

Punitive damages pose a particularly "acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). They are "quasi-criminal" penalties that "operate as private fines intended to punish the defendant and to deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (internal quotation marks omitted). As quasi-criminal penalties, punitive damages awards are subject to a vagueness standard stricter than that which governs in most other

civil and administrative contexts. *See Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982).

2. This Court has applied the due process requirement of fair notice to prohibit punishment in a variety of cases where reasonable people acting in good faith could disagree on whether the defendant's conduct was lawful.

For example, in *Southwestern Telegraph & Telephone Co. v. Danaher*, the Court considered whether a state statute authorizing civil penalties of $100 per day for discriminating against telephone customers was unconstitutionally vague. 238 U.S. at 485. The statute required telephone companies to "supply all applicants for telephone connection and facilities without discrimination or partiality" so long as the applicants complied with the company's "reasonable regulations." *Id.* (quoting Ark. Stat. § 7948). At issue was a telephone regulation stating that the company would not furnish telephone service to a customer in arrears. *Id.* at 486. The Court held that penalties could not be imposed based on a *post hoc* finding that the regulation was unreasonable, explaining that the regulation had been "adopted in good faith, had been uniformly and impartially enforced for many years"; there was "no decision in the State holding or indicating that it was unreasonable" and the statute "left that matter entirely open"; and "[l]ike regulations often had been pronounced reasonable and valid in other jurisdictions." *Id.* at 489. Under those circumstances, the penalties assessed were "so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." *Id.* at 491.

Similarly, in *Connally v. General Construction Co.*, this Court invalidated a statute authorizing penalties for employers that failed to pay employees at least "the current rate of per diem wages in the locality." 269 U.S. 385, 388 (1926) (quoting Comp. Okla. Stat. § 7255). The Court noted that the statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them

liable." *Id.* at 391. Because both the terms "current rate of per diem wages" and "locality" were undefined, the Court found that "men of common intelligence must necessarily guess" as to their meaning and the ultimate "application of the law" would depend "upon the probably varying impressions of juries," rendering the statute unconstitutionally vague. *Id.* at 391, 395.

Further, in *Giaccio v. Pennsylvania*, the Court struck down a state statute allowing a jury to require an acquitted misdemeanor defendant to pay the costs of his trial. 382 U.S. at 400, 402. The Court found that the statute allowing assessment of costs on a defendant "contain[ed] no standards at all," nor did it "place any conditions of any kind upon the jury's power to impose costs." *Id.* at 402-03. The result was that "[i]t would be difficult if not impossible for a person to prepare a defense" to an assessment of costs and "judges and jurors" would be "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Id.* at 403-04. The statute as applied was thus "void for vagueness." *Id.*

Numerous other decisions of this Court have reaffirmed that a statute is unconstitutionally vague if applied to punish certain conduct without notice sufficient to inform a reasonable person that the conduct is impermissible. *See, e.g., Morales,* 527 U.S. at 56-60 (ordinance prohibiting "loitering" was void for vagueness because it "fails to give the ordinary citizen adequate notice of what is forbidden"); *Champlin Ref. Co.*, 286 U.S. at 241-43 (penalties for "the production of crude oil or petroleum . . . in such a manner . . . as to constitute waste" was unconstitutionally vague because "waste" "necessarily depends upon many factors subject to frequent changes"); *A.B. Small Co.*, 267 U.S. at 238-42 (statute making it unlawful "to make any unjust or unreasonable . . . charge" or "exact excessive prices" for "necessaries" invalid because it "contained no provision pointing to what

should be deemed a just, reasonable and not excessive price"); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89-92 (1921) (statute imposing penalties for "any unjust or unreasonable rate or charge" for "necessaries" was unconstitutionally vague because it "forb[ade] no specific or definite act"). This Court has again and again recognized that no punishment is allowed where people "can – and do – disagree" on what conduct the law prohibits. *Colautti v. Franklin*, 439 U.S. 379, 401 (1979).

B. The Court Of Appeal Improperly Approved Punitive Damages Even Though Ford Lacked Fair Notice

The California Court of Appeal's affirmance of a $55 million punitive damages award in this case violates due process because Ford did not have fair notice that its conduct could result in punitive damages. Extremely relevant to the question of fair notice are Ford's compliance with federal regulations, its conformity with industry standards, and the existence of a genuine debate in the engineering community about the design tradeoffs at issue here. Those objective indicators demonstrate that reasonable people could disagree about the design choices Ford made and that Ford had a significant basis for believing its design was reasonable. Yet the Court of Appeal deemed those factors completely irrelevant, subjecting Ford to an enormous punitive damages verdict based simply on one jury's subjective belief that Ford should have made the Explorer more safe.

1. California law allows imposition of strict products liability based on a "risk-utility" theory, where a product is deemed defective if a jury determines that its risks outweigh its benefits. *See, e.g., Barker v. Lull Eng'g Co.*, 573 P.2d 443, 446 (Cal. 1978). Specifically, once a plaintiff demonstrates that a product caused her injuries, the burden shifts to the defendant to show that the benefits of the product as designed outweigh its risks. *Id.* at 455. The jury must determine whether the product is defective based on "such com-

peting design considerations as risk, benefit, feasibility, and cost." *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 311 (Cal. 1994).[2] California law is typical. "[M]ost jurisdictions resolve the issue of whether the product is defective by applying some form of risk-utility analysis." *American Law of Products Liability* § 28:17 (Timothy E. Travers et al. eds., 3d ed. 1997). At the same time, that theory is inherently unpredictable, because it depends upon a single jury's after-the-fact determination as to whether a product is sufficiently safe. This case proves the point: Prior to this jury's verdict, judgment had been rendered in favor of Ford in eleven other cases. *See* Appellant's Appendix ("AA") 1154-1235.

Under California law, a plaintiff may recover punitive damages when she "prove[s] by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Cal. Civ. Code § 3294(a). As pertinent here, California law defines "malice" as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." *Id.* § 3294(c)(1).

2. As applied by the Court of Appeal, the California statute authorizing punitive damages violates due process. Without reference to objective standards, the statute is so vague that manufacturers simply cannot know what conduct a jury might later decide warrants punishment.[3]

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[2] California law also recognizes another approach to evaluating alleged design defects – the consumer expectation approach. *See id.* at 882. Contributing to the vagueness problem here, this case was actually tried under both theories, but on the last day of trial plaintiffs abandoned the consumer expectation theory and the case went to the jury only on the risk-utility theory. *See* AA 8119-20.

[3] *Amici* do not suggest that the California punitive damages statute is unconstitutionally vague on its face, because there plainly is a "core of proscribed conduct" to which the statute can constitutionally be applied.

In affirming the punitive damages verdict here, the Court of Appeal set aside all objective indicators upon which reasonable people would rely. The court rejected the argument that compliance with "all applicable governmental regulatory standards" bars punitive damages, on the ground that "[g]overnmental safety standards . . . have failed to provide adequate consumer protection against the manufacture and distribution of defective products." Pet. App. 46a-49a (internal quotation marks omitted). And the court held that, as a matter of California law, "compliance with industry standards or custom [i]s *irrelevant* . . . to punitive damages." *Id.* at 23a (emphasis added). Finally, the court rejected Ford's contention that "a 'reasonable disagreement' among experts concerning the propriety of its design decisions cannot . . . be subject to punitive damages" because "there [wa]s substantial evidence that Ford decision makers knew how to make the Explorer less dangerous, but chose not to do so because of financial considerations." *Id.* at 43a-44a, 50a. Thus, the Court of Appeal – like the jury – rested its decision on its subjective disagreement with Ford's cost/benefit balancing, notwithstanding the objective indicators from which Ford could conclude that its balancing was reasonable.

The Court of Appeal's application of California punitive damages law violates due process because it deprived Ford of fair notice sufficient to allow it to design its products to avoid punishment. As explained below, ample objective indicators showed that people of "common intelligence" could "differ" as to whether the Explorer's design was reasonable. *Lanier*, 520 U.S. at 266 (internal quotation marks omitted). And even if Ford's conduct could be deemed an unreasonable balancing of risks and benefits, punitive damages re-

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Harris County v. Carmax Auto Superstores Inc., 177 F.3d 306, 325 (5th Cir. 1999).

quire *malice*, *i.e.*, a "willful and conscious disregard" for safety. Cal. Civ. Code § 3294(c)(1).[4]

3. The facts of this case highlight how the Court of Appeal's approach conflicts with this Court's teachings on fair notice and several courts' specific holdings that objective indicators of reasonableness are extremely relevant to the appropriateness of punitive damages.

At issue in this case were two alleged design defects, relating to the strength of the Ford Explorer's roof and the alleged tendency of the vehicle to roll over. The plaintiffs argued that Ford acted with "malice" in designing the Ford Explorer because "Ford had the technology to make the Explorer stable and to strengthen the roof to protect the occupant, but did not use it." Reporter's Transcript ("RT") 2047-55, 2070-81, 3557-58. Ford demonstrated that its designs complied with extensive federal regulations, conformed with industry standards, and were the subject of genuine debates in the engineering community about how to best balance performance and safety. Those objective indicators show that reasonable people could differ concerning whether the benefits of the designs outweighed their risks, and that Ford had ample basis (including the support of the automobile industry and the federal government) for concluding that its designs were reasonable. In light of those facts, Ford cannot constitutionally be punished here.

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[4] Under the "malice" standard for awarding punitive damages, a manufacturer could not have fair notice that its design decision was subject to punishment unless the court concludes that the risk-utility analysis weighs so strongly against the manufacturer so as to merit, or nearly merit, a directed verdict on liability. *See, e.g.*, *Blue Cross & Blue Shield of Miss. v. Campbell*, 466 So. 2d 833, 843 (Miss. 1985) (holding that, in the "vast majority" of cases, "unless the trial judge grants a directed verdict to the insured plaintiff on the contract claim, then, as a matter of law, the insurance carrier has shown reasonably arguable basis to deny the claim; and, therefore, the carrier should never be subjected to the possibility of punitive damages based upon 'bad faith'").

a. First, a manufacturer's compliance with the strictest applicable statutory or regulatory safety requirements should preclude punitive damages. This Court has recognized the relevance of compliance with regulatory standards in assessing the appropriateness of punitive damages. For example, in *Gore*, the Court noted that "BMW could reasonably rely on state disclosure statutes for guidance" in determining "the appropriate line between presumptively minor damage [to automobiles] and damage requiring disclosure to purchasers." 517 U.S. at 579. Not surprisingly, numerous other courts have recognized that compliance with state or federal regulatory schemes makes punitive damages inappropriate. *See, e.g., Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (evidence insufficient to support finding of "wanton" conduct in light of defendant's compliance with federal standards); *Welch v. Gen. Motors Corp.*, 949 F. Supp. 843, 845 (N.D. Ga. 1996) (rejecting punitive damages claim because defendant complied with federal regulations); *Boyette v. L.W. Looney & Son*, 932 F. Supp. 1344, 1348 (D. Utah 1996) (dismissing punitive damages claim where defendant complied with federal regulations); *see also Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (no punitive damages where "no government or agency thereof ha[d] ever required" the design modification urged by plaintiffs). Commentators agree that "[i]n most contexts . . . compliance with a statutory standard should bar liability for punitive damages." W. Page Keeton, *Prosser & Keeton on the Law of Torts* 233 n.41 (5th ed. 1984).

In this case, Ford demonstrated that the Ford Explorer complied with all applicable warning and safety standards promulgated by the National Highway Transportation Safety Administration ("NHTSA"), the expert agency charged with automotive safety. But the Court of Appeal completely disregarded as irrelevant the fact that the Explorer met or exceeded Federal Motor Vehicle Safety Standard 216, which establishes requirements for vehicle roof-crush resistance.

See Pet. App. 13a, 49a; RT 2403; *see also* 49 C.F.R. § 571.216. The court similarly ignored the fact that NHTSA has refused to find SUVs defective as a class because of their tendency to roll over, and NHTSA twice declined to find that the Bronco II, the precursor to the Explorer, was defective. *See* 64 Fed. Reg. 27,343 (May 19, 1999). And it also ignored the fact that the Explorer passed the tests that NHTSA recognizes as "the most objective tests of the susceptibility of vehicles to maneuver-induced on-road rollover," 68 Fed. Reg. 59,250, 59,251-52 (Oct. 14, 2003), and that the Explorer displayed the prominent warning label required by NHTSA to alert consumers of the potential of vehicle rollover. *See* 49 Fed. Reg. 20,016 (May 11, 1984).

Plaintiffs' only answer is that NHTSA was wrong and that its safety standards should have been more stringent. While that argument might be relevant to whether Ford should be liable for compensatory damages, it cannot justify punitive damages. Indeed, it proves Ford's point – Ford could not have known that it would be punished for its design because it complied with federal regulations and guidelines. Lacking clear, uniformly applied standards for punitive liability, juries in individual cases should not be allowed to trump federal safety standards and mete out punishment to manufacturers whose decisions were consistent with the most stringent regulations of an expert federal agency.

b. Second, Ford's compliance with industry standards further demonstrates that punishment is inappropriate. Numerous courts have recognized that punitive damages cannot be justified under the amorphous "malice" standard applied here and in numerous other cases when a manufacturer's product comports with then-current industry standards. *See, e.g.*, *Satcher*, 52 F.3d at 1316-17 (no punitive damages where "the industry as a whole categorically reject[ed]" alternative design); *Drabik v. Stanley-Bostitch*, 997 F.2d 496, 510 (8th Cir. 1993) ("Compliance with industry standard and

custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind with no knowledge of a dangerous design defect."); *Nigro v. Remington Arms Co.*, 637 A.2d 983, 989-90 (Pa. Super. Ct. 1993) ("Compliance with industry standard and custom tends to . . . negate an inference of wanton indifference to the rights of others.").

Here, plaintiffs' Ford Explorer had "one of the best rollover rates compared to other SUVs in its class." Pet. App. 20a. The Explorer complied with five real-world vehicle stability tests commonly used by automobile manufacturers. RT 3635-36, 3657. For ten consecutive years, Consumer's Union awarded the Explorer a "recommended" rating for safety based on independent testing, RT 3232; AA 412, even though it awarded other SUVs "poor" or "unacceptable" ratings. *See, e.g., CR's Focus on Safety*, Consumer Reports, Apr. 2003, at 29. Those test results reflect the soundness of the Ford engineers' judgment and strongly suggest that Ford had no basis to know that its design could be deemed not only defective but *maliciously* defective.

c. Third, a good-faith debate over the best way to balance costs and benefits of a design empirically demonstrates that reasonable people could disagree over whether a manufacturer's conduct in designing a product was lawful. Many state and federal courts have recognized that a genuine engineering debate precludes punitive damages. *See, e.g., Satcher*, 52 F.3d at 1316-17 (no punitive damages where "there is a genuine dispute in the scientific community as to whether leg guards do more harm than good"); *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (punitive damages inappropriate where "reasonable disagreement" exists concerning the product); *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (reversing punitive damages award where there was a "good faith dispute" not rising to the level of "reckless indifference").

Here, the record sets forth the extensive good-faith efforts Ford engineers devoted to safety issues when designing the Explorer. Ford engineers sought to constantly improve the Explorer. For example, the Explorer was based the Bronco II ("BII"), but Ford engineers designed the Explorer "using a handling philosophy notably different from the BII," AA 2483-88, which ultimately resulted in the Explorer's demonstrably superior performance in the Consumer Union "accident avoidance" test. Ford also adopted several design changes to further enhance the safety of the Explorer even after it passed all of Ford's internal safety tests and the stability tests independently conducted by NHTSA. AA 2502. In making each of those design decisions, Ford balanced an incremental safety advantage – over and above the safety levels approved by NHTSA and validated by both Ford and independent testing – with tradeoffs in cost and in features consumers find desirable.

Plaintiffs argued that Ford's choice not to implement two additional design changes warrants punitive damages. But the fact that engineers debated those design changes and came to opposite conclusions shows that Ford was engaging in precisely the type of "line-drawing," *Gore*, 517 U.S. at 579, that a manufacturer must make all the time in choosing among competing designs. And in this particular debate, Ford's engineers were joined by the federal government and the rest of the domestic automobile industry. The fact that there was a debate in the engineering and regulatory community over the proper stability or roof-strength standards for utility vehicles, such as the Explorer, points strongly against any award of punitive damages.

C. This Court Should Grant Review Because Of The Importance Of Fair Notice In Stopping Runaway Punitive Damages Awards

Punitive damages in products liability cases continue to become more and more common, and the question of the

relevance of objective indicators will continue to recur. Under the Court of Appeal's approach, juries will be allowed almost standardless discretion, and manufacturers will be penalized for responsible corporate behavior. The time has come for this Court to step in.

1. Punitive damages awards have become commonplace in products liability cases. "The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990). Juries are often faced with sympathetic, severely injured plaintiffs and told that their injuries could have been prevented if only the manufacturer had just spent more money. And juries are often urged to award large punitive damages through explicit references to a defendant's massive wealth and lack of a local presence. *See Oberg*, 512 U.S. at 432 (noting that "the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences"). As a result, the "frequency and size" of punitive damages awards continues to "skyrocket[]." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting); *see also* Pet. 19 n.6 (collecting cases).

2. The Court of Appeal's approach will exacerbate this trend by allowing the imposition of punitive damages in essentially any case where the jury finds that a product is defective. The jury will not be constrained by objective indicators of reasonableness; all it need do is make a *post hoc* determination that the manufacturer should have done something more. *See* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. 107, 116 (2001) (noting the risk that a company's "superior *ex ante* risk judgments may be outweighed by the *ex post* reality of the accident victim").

The unavoidable reality is that manufacturers are *always* aware that their design choices will be subject to criticism because their products could have been made even safer. Products – particularly those that are designed to transport people at high speeds – can and do cause serious injury and death. That unfortunate mathematical certainty, however, applies to every vehicle sold in this country, as well as to countless other products. Indeed, "over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*." *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991). Some risks are unavoidable, and others are accepted because consumers are unwilling to accept the tradeoffs required for their reduction. *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 13-14 (1993).

It is thus no overstatement to say that, in every products liability case, a plaintiff will be able to offer "proof" that some alternative design, identified years or decades after the fact, would have made the product safer. As one commentator has observed, "[r]egardless of how high the manufacturer sets the design safety standard, when an accident does occur, the plaintiff's lawyer will have an expert to testify the product could have been made safer, and the injury prevented, if the manufacturer had just been willing to spend some additional money." Andrew C. Clausen & Annette M. Carwie, *Problems Applying the* Life of Georgia v. Johnson *Case in the Liability Setting: Where Do We Go With Punitive Damages After* BMW v. Gore*?*, 58 Ala. Law. 46, 48 (1997). The malice standard will thus be rendered toothless, and there will be no gatekeeper for punitive damages awards.

3. The unconstrained jury discretion afforded by the Court of Appeal's approach will lead to arbitrary results. As one of the leading scholars on punitive damages has observed, "[t]he very notion of how much design safety is enough . . . involves a morass of conceptual, political, and

practical issues on which juries, courts, commentators, and legislatures strongly disagree." David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 37-38 (1982). Varying impressions of juries on the safety issues involved in this case is not a mere probability; it is a fact, with numerous defense verdicts having been returned in Explorer cases both before and after the verdict in this case. Jurors will be allowed to effectively thwart federal regulations, even though those regulations were "adopted with studied care" by expert agencies, often in areas "where the difficulty of defining defectiveness (the 'proper' mix of safety and its tradeoffs) are especially great." Owen, *supra*, at 41-42. Without the constraint of objective standards, there is a significant threat that juries will award punitive damages based on their own "personal predilections" concerning risk-utility balancing. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (internal quotation marks omitted). This is the precise result procedural due process is meant to prevent.

4. Moreover, a system in which juries are permitted to award punitive damages based solely on subjective risk-utility balancing creates perverse incentives. Empirical evidence shows that many jurors are willing to inflict punitive damages simply because a defendant has engaged in risk-utility balancing. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 550-51, 556, 589-90 (2000). This has the effect of punishing defendants that have thoroughly debated the risks and benefits of various product designs. *Id.* at 550, 558. Although that is what responsible manufacturers do *ex ante*, *ex post* it is a "red flag[]" demonstrating a "callous disregard for human health." *Id.* at 578.

Further, if a manufacturer is subject to punishment where reasonable people can conclude that the product is reasonably safe, there is only one way for a manufacture to order its affairs to avoid punishment: Stop selling any product that

can cause injuries and that some jury *may*, years or even decades later, find could have been made more safe. "[A] firm might be induced to withdraw its product from the marketplace even though consumers place a higher value on the product than its full cost of production, which includes the average harm caused by the product." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 882 (1998). And for those manufacturers that choose to continue making their products, the specter of punitive damages is likely to chill innovation and "produce excessive caution in risk-averse managers and companies." Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2077 & nn.22-23 (1998).

* * *

This Court recently warned that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system . . . may threaten arbitrary punishments, *i.e.*, punishments that reflect not an application of law but a decisionmaker's caprice." *Williams*, 127 S. Ct. at 1062 (internal quotation marks and citation omitted). This case addresses that precise risk. The Court of Appeal's approach unmoors punitive damages from any objective bases for punishment and leads almost inexorably to arbitrary punishments. This Court should grant review to ensure that defendants are given fair notice before any punitive damages may be imposed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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